

Court of Appeals Docket No. 06-55406  
Consolidated with Docket Nos. 06-55425 and 06-55405

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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PERFECT 10, INC.,

Plaintiff, Appellant and Cross-Appellee

vs.

GOOGLE, INC.

Defendant, Appellee and Cross-Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT, CENTRAL  
DISTRICT OF CALIFORNIA, HON. A. HOWARD MATZ,  
USDC NO. CV 04-9484 AHM (SHx)  
CONSOLIDATED WITH CV 05-4753 AHM (SHx)

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**BRIEF OF *AMICUS CURIAE* MOTION PICTURE ASSOCIATION OF  
AMERICA, INC. (MPAA) IN SUPPORT OF PLAINTIFF PERFECT 10,  
INC.'S APPEAL SEEKING REVERSAL IN PART AND AFFIRMANCE IN  
PART OF THE DISTRICT COURT'S ORDER DENYING IN PART AND  
GRANTING IN PART A PRELIMINARY INJUNCTION**

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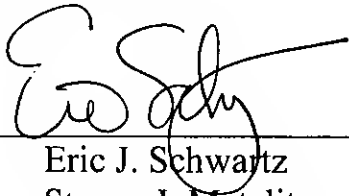
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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *AMICUS CURIAE* MOTION PICTURE ASSOCIATION OF AMERICA, INC., (MPAA), certifies that it has no parent or subsidiary corporations, and no publicly held company owns 10% or more of its stock.

DATED: June 6, 2006

Respectfully submitted,

By   
Eric J. Schwartz  
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**INTERESTS OF THE AMICUS**

With the consent of all parties, pursuant to FRAP 29(a), the Motion Picture Association of America, Inc. (MPAA) respectfully submits this amicus brief in support of Plaintiff's appeal from the District Court's denial, in part, of a motion for a preliminary injunction.

The MPAA is a trade association whose members include the largest motion picture distributors in the United States.<sup>1</sup> Founded in 1922, the MPAA serves as the voice and advocate of the domestic motion picture, home video and television industries. Increasingly, MPAA member companies – like other owners of copyright – are using new ways of publicly displaying, publicly performing, and distributing their works in electronic form. But their digital dissemination efforts are undercut by widespread infringement of their copyrighted works online. The harmful impact of this illegal activity is felt not just by copyright owners, but also by consumers, who are deprived of the added creativity and the broader, more

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<sup>1</sup> The members of the MPAA are Buena Vista Pictures Distribution (Disney), Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP and Warner Bros. Entertainment Inc.



diverse and more convenient public dissemination of copyrighted material that would flow from effective copyright protection. Amicus thus has a strong interest in ensuring the proper application of copyright law, and of the doctrines of indirect liability for copyright infringement, to Defendant Google and to other entities whose businesses enable the digital distribution, public performance and public display of copyrighted works.

### **SUMMARY OF ARGUMENT**

The District Court applied the wrong standards in ruling on several issues of third party and direct infringement.

The District Court dismissed the concept that knowingly facilitating access to infringing materials through search tools could constitute “material contribution” for purposes of establishing contributory liability. It overlooked that Congress in 1998 specifically addressed the risk of infringement liability for providers of “information location tools,” by creating a framework in 17 U.S.C. § 512(d) for encouraging cooperative efforts against infringements while severely limiting liability for providers like Google. The incentives Congress provided for such cooperation would be fundamentally jeopardized under the District Court’s approach. Moreover, the “but for” test applied below for determining material contribution is contradicted by this Court’s precedents.

The tests the District Court used for direct infringement of the exclusive public display and distribution rights are inconsistent with the Copyright Act. Under the District Court’s “server test,” an online entity that does not host an infringing copy of an image cannot be liable for displaying it to the public; but, Congress meant the “public display” right to be invoked even when no infringing reproduction occurs. Similarly, making copies of works available for distribution infringes the distribution right, even if no actual transfer is shown. In both cases, the practical impact of the District Court’s approach would undermine copyright protection on the Internet.

Finally, although the District Court properly concluded that Google is likely a direct infringer because of the “thumbnail” versions of Plaintiff’s works and that such infringement is not excused as a “fair use,” its analysis of transformation, within the first statutory fair use factor, was misplaced. Google’s copies served only to lead users to infringing full-size images, so Google’s use was not transformative, and the critical first factor should have weighed heavily against it.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED IN ITS TREATMENT OF MATERIAL CONTRIBUTION AS AN ELEMENT OF CONTRIBUTORY LIABILITY**

Plaintiff claimed that Google is contributorily liable for the widespread direct infringement of Plaintiff’s copyrighted images by third-party websites to

which Google links. The District Court's conclusion that these claims were unlikely to succeed rests on a misapprehension of what constitutes a "material contribution" in the online environment. Although the Copyright Act does not define the circumstances in which contributory liability applies, Congress in 1998 specifically addressed the potential liability of online providers (like Google) of information location tools that direct users to infringing material. Recognizing that good search tools are "essential to the operation of the Internet," S. Rep. No. 105-190 at 49 (1998) ("Senate OCILLA Report"), Congress drew a roadmap for how providers could minimize their exposure to liability through a "safe harbor" mechanism based on cooperation with copyright owners against online infringement. 17 U.S.C. § 512(d). By overlooking this statutory framework, as well as this Court's precedents, the District Court's contributory liability analysis went astray and led it to apply the wrong standard in determining whether Google made a "material contribution" to infringement.

To establish contributory infringement, a plaintiff must show that a defendant "knew or had reason to know of the infringing activity" while also materially contributing to it. Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004). The District Court assumed that Google had the requisite knowledge,<sup>2</sup> but

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<sup>2</sup> There was no need for the District Court to avoid making a finding that Google had knowledge. The multiple letters from Plaintiff informing Google of the location of infringing images as well as Plaintiff's copyright registration

found that it did not materially contribute to direct infringements by third party websites because “[t]here is no evidence that these sites rely on Google AdSense for their continued existence” and because “[s]uch websites existed long before Google Image Search was developed and would continue to exist were Google image search shut down.” Perfect 10, Inc. v. Google, Inc., 416 F. Supp. 2d 828, 856 (C.D. Cal. 2006). In so doing, the District Court ignored the rule that to materially contribute to direct infringement a defendant need only engage “in personal conduct that encourages or assists in the infringement.” Napster, 239 F.3d at 1019. In short, it confused material contribution with life support, and imposed a “but for” test that is inconsistent with this Court’s precedents.<sup>3</sup>

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information should have been sufficient to provide defendant with actual knowledge of infringement. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 n.5 (9th Cir. 2001) (Napster had actual knowledge of infringing activity where the RIAA informed Napster of the activity). At a bare minimum the letters surely were enough to demonstrate constructive knowledge. Cf. Ellison, 357 F.3d at 1077 (defendant had reason to know of infringing material where a subscriber phoned defendant to inform it of infringing activity).

<sup>3</sup> In addition, the District Court’s citation of Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) within its discussion of material contribution was misplaced and inconsistent with 9th Circuit case law post-dating Sony. Compare 416 F. Supp. 2d at 856 (“Moreover, it would be a ‘gross generalization that cannot withstand scrutiny’ to argue that ‘supplying the ‘means’ to accomplish an infringing activity and [even] encouraging *that activity to take place through advertisement* are sufficient to establish liability for copyright infringement.’”) (emphasis in original) with Fonovisa, Inc. v. Cherry Auctions, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (endorsing the holding of Columbia Pictures Ind., Inc. v. Aveco, Inc., 800 F.2d 59 (3d Cir. 1986) that “providing the site and facilities for known infringing activity is sufficient to establish contributory liability” and

In Fonovisa, this Court stated that where “it would be difficult for the infringing activity to take place *in the massive quantities alleged* without support services provided by” a defendant, courts should have “little difficulty in holding” that the defendant provided the direct infringer with material contribution. 76 F.3d at 264 (emphasis added).<sup>4</sup> In this case, a high level of direct infringement indisputably took place on numerous third party sites. Had the District Court asked whether it would be difficult for these infringing sites to thrive without Google’s search engine and the financial support provided by its AdSense program, the answer clearly would have been yes. If Plaintiff was able to show that Defendant connects willing providers of infringing content with willing

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stating that “[m]erely providing the means for infringement may be sufficient’ to incur contributory copyright liability” 12 years after the Sony decision) (internal citation omitted). This court’s reliance on the quoted Sony language in its contributory liability analysis in Napster went to the issue of whether to infer knowledge, not to the issue of material contribution. 239 F.3d at 1021-1023. Furthermore, the language from the Sony decision relied upon by the District Court is of questionable value after the Supreme Court’s decision in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2782 (2005) (emphasis added) where the Court stated that “Sony dealt with a claim of liability based *solely* on distributing a product,” and instructed courts not to rely heavily on Sony where claims involve additional conduct by defendants. This case fits that description.

<sup>4</sup> Similarly, in the recent decision in Columbia Pictures v. Bunnell, No. CV 06-01093 FMC (JCx), Slip. Op. at 4 (C.D. Cal. May 10, 2006) (emphasis added), the court denied a defendant’s motion to dismiss a plaintiff’s contributory infringement claim where the plaintiff alleged that “[a]bsent Defendant’s active and ongoing participation in the daily acts of infringement, this widespread unauthorized copying and distribution of Plaintiff’s valuable property simply could not happen *on the scale it does.*”

consumers of infringing content through its image search service, it would go far beyond the Fonovisa precedent to require also proof that the sites could not exist at all without Google.<sup>5</sup> The flea market in Fonovisa made a “material contribution” when it provided distributors of infringing cassette tapes and CDs with customers, even though those distributors may well have existed before and had other outlets besides the defendant. Fonovisa, 76 F.3d at 264. Here, Google’s image search service provides purveyors of infringing images with access to millions of eager viewers that they could not otherwise have reached in the vast expanses of the Internet. Under established precedents, the facts here support a finding of material contribution.

While disregarding the similarities between Google and Fonovisa’s flea market, the District Court’s opinion makes much of the differences between Google and Napster. After a long list of asserted distinctions between the conduct of Google and of Napster, the District Court concludes, “Google resembles Napster only in facilitating searches.” 416 F. Supp. 2d at 855. But even if the District Court’s comparative table was accurate,<sup>6</sup> its focus on the Napster precedent may

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<sup>5</sup> Although the popular press has noted, “If you’re not indexed by Google, you pretty much don’t exist.” Steven Levy, “All Eyes on Google,” *Newsweek*, March 29, 2004, available at <http://www.msnbc.msn.com/id/4570868> (viewed June 5, 2006).

<sup>6</sup> Plaintiff’s brief persuasively contests the accuracy of the table on pages 31-6.

obscure the fact that facilitating searches alone can be a material contribution, and can be the basis for contributory liability when the facilitation has the aim of leading the user to a site where Google knows infringing material can be found. See Bunnell, No. CV 06-01093 FMC (JCx), Slip Op. at 3 (plaintiff can establish contributory liability by proving that the defendant's site and/or network "automatically and invisibly instructs a user's computer where to go and how to get" infringing content).<sup>7</sup>

The District Court's aversion to resting a finding of material contribution upon the provision of search technology that leads to known sites for infringement is not surprising. Indeed, it was a similar concern that led Congress to deal with this issue in 1998, in the Online Copyright Infringement Liability Limitation Act (OCILLA), enacted as Title II of the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860. Unfortunately, as OCILLA's text and legislative

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<sup>7</sup> The District Court opined that "there are significant differences" between the facilitation efforts of Google and Napster, but this assertion rests on a factual basis that is selective at best. 416 F. Supp. 2d at 855. Even if Napster was "dedicated" to audio files, similar services with a broader reach are exposed to contributory liability. See, e.g., Grokster, 125 S. Ct. at 2772 (providing that "some distributors of unprotected content have used peer-to-peer networks to disseminate files, Shakespeare being an example"). Conversely, while "Google helps users locate all types of information," Google Image Search -- the aspect of Google's search service at issue here -- only helps users locate images. Furthermore, while the boundaries of the universe searched by Napster were defined solely by Napster's users, who made the decisions about what files to place in their shared folders and what titles to give them, the universe searched by Google is defined almost solely by Google itself, both through its crawler algorithms and by its policies regarding preferential listing of advertising partners.

history make clear, the District Court's way of resolving the problem is fundamentally at odds with the "safe harbor" framework created by Congress in OCILLA. 17 U.S.C. § 512(d).

It is true that OCILLA itself does not create infringement liability. Ellison, 357 F.3d at 1077. Its remedial limitations are to be applied against the background of existing doctrines of contributory and vicarious infringement. However, if there were no credible risk of liability for certain activities, then there would have been no need for Congress to respond to the calls of service providers engaged in those activities who "sought greater certainty through legislation as to how [judicially created] doctrines" of liability would be "applied in the digital environment."

House Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998 at 25 (Comm. Print 1998), reprinted in 46 J. Copyright Soc'y U.S.A. 631 (1999) ("House Manager's Report").

Section 512(d) provides a statutory framework that "establish[es] a safe-harbor from copyright infringement liability for information location tool providers if they comply with the notice and takedown procedures and other requirements" of the statute. Senate OCILLA Report at 49. "If it is claimed that [a service provider] is committing an infringement by using information location tools to link its users to infringing material...then...the criteria in subsection (d) are applicable"



to determine “whether it qualifies for the liability limitation for information location tools.” *Id.* at 56. Congress (and service providers similarly situated to Google) evidently believed that an entity could be liable under some circumstances for infringement “by reason of ... referring or linking users to an online location containing infringing material or infringing activity, by using information location tools,” 17 U.S.C. § 512(d), or else the entire provision would have been unnecessary.

Although “information location tools” is not defined in OCILLA, the legislative history refers to search engines such as Google’s. See Senate OCILLA Report at 47 (“the term information location tools includes, for example...a search engine that identifies pages by specified criteria”).<sup>8</sup> Section 512(d) identifies the circumstances by which an entity providing a search engine can limit the remedies imposed upon it for copyright infringement liability arising from that activity. In “codif[ying] a liability system based on the core of current case law dealing with the liability of online service providers,” House Manager’s Report at 25, Congress implicitly acknowledged that providing such tools could materially contribute to infringement. Subsequent court decisions have made it more explicit that the behavior involved in this case could be a material contribution. See, e.g., Arista Records Inc. v. MP3Board, Inc., No. 00 Civ. 4660 (SHS), 2002 U.S. Dist. LEXIS

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<sup>8</sup> The search engine of Yahoo!, one of Google’s main competitors, is discussed at length in the OCILLA legislative history. House Manager’s Report at 32-4.

16165, at \*16 (S.D.N.Y. Aug. 29, 2002) ( material contribution can be based on “an automated system devoted to searching for, aggregating and organizing links,” even though no infringing files were stored on the site); Perfect 10, Inc. v. Cybernet Ventures, 213 F. Supp. 2d 1146, 1171 (C.D. Cal. 2002) (“in particular, [defendant’s] steady payments to infringing sites along with its advertising” among other services amounted to material contribution).

In enacting OCILLA, Congress sought to “preserve[ ] strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment.” Senate OCILLA Report at 40. The Section 512(d) safe harbor furthers this goal, drastically reducing the exposure of search engine providers if they cooperate with right holders by responding to notices that the destination to which users are being channeled is an infringing one. The OCILLA “notice and takedown” procedure has been a vital tool against online infringement, one that Amicus and other copyright owners have relied upon thousands of times since 1998 to remove infringing content from the Internet. The incentive Congress provided for search engines to cooperate in “notice and takedown” is the safe harbor, which is itself premised on the threat of liability in some circumstances for providing search tools. The District Court’s opinion undermines this carefully balanced incentive structure for combating infringements in cyberspace.

In 1998, Congress anticipated the District Court’s conclusion that “search engines...provide great value to the public,” 416 F. Supp. 2d at 849; indeed, the stated goal of § 512(d) is “to promote the development of information location tools,” recognizing that they are “essential to the operation of the Internet.” House Manager’s Report at 33-4; Senate OCILLA Report at 49. But Congress chose to achieve these goals, not by rewriting the doctrine of contributory liability to immunize search services, but by leaving the doctrine unchanged and creating a safe harbor – based on cooperation with copyright owners -- to encourage responsible deployment of these critical tools. The District Court took the other path, and hence went astray. This detour was not only unjustified but also unnecessary, since Congress had already acted to keep the imposition of indirect liability on search engine providers within appropriate bounds.

## **II. THE DISTRICT COURT’S CONCLUSIONS REGARDING DIRECT INFRINGEMENT OF THE PUBLIC DISPLAY AND DISTRIBUTION RIGHTS WERE INCORRECT AND ITS FAIR USE ANALYSIS WAS FLAWED**

The District Court’s direct infringement analysis was flawed in three main ways: its discussion of whether Google infringed the “right of public display” of full-size images of Plaintiff’s works; its application of the public distribution right; and its analysis of the fair use defense, especially as it pertains to “transformative” uses.

**A. THE “SERVER TEST” FOR APPLYING THE PUBLIC DISPLAY RIGHT IS INCONSISTENT WITH THE LAW**

The District Court erred by applying a new “server” test to assess Google’s liability for direct infringement of the display right. The “server” test contravenes the statutory definition of a “public display” found in 17 U.S.C. § 101 because it conflates the display right with the discrete exclusive right of the making of copies of a work.

Copyright subsists if a work is “fixed in any tangible medium,” 17 U.S.C. § 102(a), and the copyright owner possesses five distinct exclusive rights with respect to any such fixation. 17 U.S.C. § 106. However, under the District Court’s reasoning, a defendant can be liable for online infringement of the public display right only if it simultaneously “hosts and serves” an infringing reproduction of the same work. This unprecedented hurdle for asserting the right of public display would make that right almost meaningless on the Internet.

“To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process...” 17 U.S.C. § 101. The display right is premised on the presentation, (i.e., “to show a copy”) not the replication of the work.<sup>9</sup> There is no requirement to “make” a copy or even to

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<sup>9</sup> The same is true of the public performance right, a key right for the owners of copyright in motion pictures. Thus, a defendant licensed solely to distribute copies of a work has no right to publicly perform any of those copies in its stores (what the court called “defendant’s *exhibition*” or its “showcasing” of the works). See

physically possess the copy being displayed. See Playboy Ent., Inc. v. Webbworld, Inc., 991 F. Supp. 543, 552 (N.D. Tex. 1997) (allowing Internet users to view copyrighted works on their computer monitors “constitutes a display” without requiring possession of a copy); see also Kelly v. Arriba Soft Corp., 280 F.3d 934, 946 (9th Cir. 2002), withdrawn, 336 F.3d 811 (9th Cir. 2003) (“By allowing the public to view Kelly’s copyrighted works while visiting Arriba’s web site, Arriba created a public display...”). Once a copy exists, anyone who displays that copy without authorization of the copyright owner infringes the public display right whether or not a further copy is made.

The text and legislative history of the Copyright Act clearly denote that the public display right: (1) is entirely independent of the right of reproduction; (2) applies broadly to viewing, transmitting or otherwise communicating by “each and every method”;<sup>10</sup> (3) applies to an initial and any subsequent display; and (4)

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Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 156-7 (3rd Cir. 1984) (“the rights granted by section 106 are separate and distinct, and are severable from one another”).

<sup>10</sup> The House Report of the 1976 Act states:

In addition to the direct showings of a copy of a work, “display” would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system...Each and every method by which the images or sounds comprising a performance or display are picked up and

applies to any and all parties who engage in the display to third parties. The District Court's creation of an Internet-specific test lacks any statutory anchor.

Without authorization, Google presents images of Plaintiff's works (on a single screen with the full-size images and thumbnail versions) through "in-line linking" or "framing." Google, 416 F. Supp. 2d at 831. Under the "server" test, the District Court found that the thumbnail versions violated the display right but the full-size images did not, because Google copies the thumbnail versions onto its server before displaying them, but does not do so for the full-size images which rest on third-party infringing sites.

The District Court says its new test "reflects the reality of how content actually travels over the internet." Id. at 843. But it does not reflect copyright law. Neither how nor where a copy of a work "travels" or rests on a server is relevant for infringement of the right of display. One who, without authorization, "show[s] a copy of [a work]...by means of any...device or process," and does so publicly, infringes the public display right. 17 U.S.C. § 101.<sup>11</sup>

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conveyed is a "transmission," and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106.

H.R. Rept. No. 94-1476, at 64 (1976).

<sup>11</sup> The display is clearly "public" in accordance with § 101 (definitions): "To perform or display a work 'publicly' means ... (2) to transmit or otherwise communicate a performance or display of the work ... to the public, by means of

Congress designed the display right to cover any and all future technological means of showing copyrighted works in public without the consent of the copyright owner. Professor Goldstein states, “[a]s the Internet and other vehicles for electronic transmission of text and images proliferate, the public display right may eventually acquire the same economic significance that the reproduction right possessed in the nineteenth and twentieth century.” Paul Goldstein, 2 Goldstein on Copyright §7.10 (2005).<sup>12</sup> This prediction will certainly fail to reach fruition if this Court adopts the “server test” and treats unauthorized public displays as infringing only if they involve infringing reproductions. The District Court apparently assumed that the advent of the Internet requires courts to cut back the scope of exclusive rights Congress granted in 1976. This Court should correct that error.

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any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” Note that it is the display, not necessarily a copy, which is communicated.

<sup>12</sup> Past and present Registers of Copyright agree that the reproduction and display rights must not be merged into one. “[T]he Register [in 1965] noted the significance for the future ‘of information storage and retrieval devices; when linked together by communication satellites or other means, these could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images.’” Goldstein, §7.10. As this case shows, that future has arrived. See also New York Times Co. v. Tasini, 533 U.S. 483, 498 n.8 (2001), citing Letter from Register of Copyrights Marybeth Peters, reprinted in Cong. Rec. at E812 (February 14, 2001) (“[T]he fact remains that the Act enumerates several separate rights of copyright owners, and the public display right is independent of the reproduction and distribution rights.”)

Besides the statute and its legislative history, strong practical imperatives counsel that copyright law hold accountable not only the “hosting” site which makes an unauthorized reproduction, but all other sites that display or perform that work. Take, for example, a foreign website that illegally reproduces a U.S. copyright owner’s work, and a U.S. website that “showcases” that work for the benefit of end-users without “hosting and serving” a copy of it. Under the “server test,” the copyright owner could be left without any effective remedy under U.S. copyright law, even against a willful infringer. Indeed, to the extent the District Court’s display right analysis applies to the related yet distinct public performance right (which has its own unique history and contours), it could provide a roadmap for copyright pirates to establish unauthorized motion picture streaming services in which the actionable direct infringement would be beyond the reach of U.S. courts.

The District Court’s concern about the impact of what it calls “the incorporation test” on “the core functionality of the web” is overstated. 416 F. Supp. 2d at 841. Any web operator, including this Defendant, could easily avoid direct liability under the public display right, by, for instance, simply providing hyperlinks for end-users to allow them to go for themselves onto third-party sites. Online Policy Group v. Diebold, Inc., 337 F. Supp. 2d 1195, 1202 n. 12 (N.D. Cal.



2004).<sup>13</sup> Instead, Google opens the curtain on the full-size images and places them on the end-user's screen as if presenting them from its own server. The end-user probably is unaware that the actual images reside elsewhere (or that the thumbnail and full-size copies are stored in different places), but that too is irrelevant to the right of public display that Congress provided. To serve as an electronic impresario for the work of another brings with it obligations, and, if the impresario acts without authorization, direct liability.

**B. THE DISTRICT COURT INCORRECTLY APPLIED THE DISTRIBUTION RIGHT AS REQUIRING PROOF OF "ACTUAL DISSEMINATION"**

The District Court refers incorrectly to the right of distribution found in § 106 as requiring "actual dissemination [which] means the transfer of a file from one computer to another." 416 F. Supp. 2d at 844. Statutory and case law are clear that the distribution right is infringed when a copy of a work is offered for digital transmission over a computer network whether or not any file containing the copy is ever actually transferred. This is true whether the defendant offers copies directly to end-users or displays images hosted elsewhere that the end-user can then download.

The Copyright Act provides the exclusive right to "distribute copies . . . to the public by sale or other transfer of ownership, or by rental, lease, or lending," or

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<sup>13</sup> Of course, it might risk liability as a contributor or vicarious infringer, but it could limit its exposure by qualifying for a safe harbor under 17 U.S.C. § 512.

to authorize others to do so. 17 U.S.C. § 106(3). The Copyright Act does not define “distribute” or “distribution.” However, courts have often pointed to the definition of “publication” in determining the scope of the distribution right. As the Supreme Court has noted, the legislative history of the 1976 revision of the Copyright Act indicates that “Clause (3) of section 106, established the exclusive right of publication . . .” Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985), quoting H.R. Rep. No. 94-1476, at 62.<sup>14</sup> Subsequent courts have also interpreted this reference in the legislative history to equate “distribution” with “publication.” See, e.g., Ford Motor Co. v. Summit Motor Prods., Inc., 930 F.2d 277, 299 (3d Cir. 1991), reh’g denied, 1991 U.S. App. LEXIS 20602 (3d Cir. May 13, 1991) (“‘[p]ublication’ and the exclusive right protected by section 106(3), then, are for all practical purposes, synonymous”).

The Act defines “publication” as

the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display,

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<sup>14</sup> The 1976 Act’s legislative history refers, as early as 1961, to the right of distribution as a right of “publishing copies.” Kaminstein Legislative History Project, Copyright Act of 1976 at 171 (Alan Latman & James F. Lightstone, eds. 1981), “Discussion of Proposed Amendment,” Report of Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. (1961), Chapter III, Recommendations (“subject to certain limitations and exceptions to be discussed below, the statute should continue [as it did under the prior 1909 Act] to accord to copyright owners the exclusive rights to exploit their works by (1) making [reproducing] and publishing [distributing] copies”).

constitutes publication. A public performance or display of a work does not itself constitute publication.

17 U.S.C. § 101.

The “publication” definition by its terms defines a work as “published” based on a mere “offering.” See M. & D. Nimmer, 1 Nimmer on Copyright § 4.04 (2005) (collecting cases). So, “offering” copies to the public without authorization is sufficient to violate the right of distribution.

In addition, since a copyright owner not only enjoys the exclusive right “to do” but also “*to authorize*” a distribution, the exclusive right of distribution is also violated whenever a person authorizes the transfer of a copyrighted work without the permission of the copyright owner. M. & D. Nimmer, 3 Nimmer on Copyright § 12.04 (2005) (“Given that the statute does not tie such authorization to an actual act of infringement, it would seem that no further requirement exists of direct infringement”).

Case law supports this reading of the distribution right. In Hotelling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997), the court held that a library distributes a work per § 106(3) by placing an infringing copy in its collection and making it available to the public, even if there is no evidence that the work has ever been accessed. The court reasoned, “[a]t that point, members of the public can visit the library and use the work.” Thus, because the plaintiff showed that the library had taken every step but the last – and

made it possible for its patron to take that last step at a time of the patron's choosing – the library was held liable for infringing the distribution right. Under the same principles, any website that “offers” copies of Plaintiff's copyright-protected photographs infringes Plaintiff's right of distribution.

**C. THE DISTRICT COURT MISAPPLIED THE FIRST STATUTORY FAIR USE FACTOR BY FINDING GOOGLE'S USE OF THUMBNAIL COPIES “TRANSFORMATIVE”**

The District Court properly rejected Google's fair use defense to the claim that it directly infringed Plaintiff's copyrights by creating and displaying thumbnail copies of Plaintiff's works. But its analysis of the fair use factors was flawed, and should be corrected on appeal. The main mistake involves the first statutory fair use factor – “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes...” 17 U.S.C. § 107.<sup>15</sup> As this Court has noted, without “justification under the first factor, ...

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<sup>15</sup> The District Court's application of the other statutory factors also raises questions. 17 U.S.C. § 107. Regarding the second factor (nature of the copyrighted work), to weigh previous publication of a work in favor of a fair use finding would undermine protection of any work made available online with authorization. Courts should not discourage such authorized dissemination by holding it against copyright owners under the second factor. The third factor (amount and substantiality of portion used) should strongly favor plaintiff where a defendant systematically reproduces entire works, and indeed, practically an entire catalogue of works. On the fourth factor (impact on market for and value of the work), the District Court brushed aside the impact of the thumbnail copies on the market for full-sized images. Since the ultimate result of making the thumbnails was to facilitate users' access to infringing full-size images, this impact could have been considerable. See also our discussion of the fourth factor at page 28 *infra*.

there can be no fair use.” World Wide Church of God v. Church of Philadelphia, 227 F.3d 1110, 1120 (9th Cir. 2000) (internal citation omitted), cert. denied, 532 U.S. 958 (2001). In particular, the District Court erred in finding that “Google’s wide-ranging use of thumbnails is highly transformative.” 416 F. Supp. 2d at 848.

This finding relied heavily on this Court’s second opinion in Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003), which found that a search engine’s use of thumbnail versions of the plaintiff’s photographs was transformative – even though it entailed the systematic replication of multiple works – because the thumbnails served a different function than the full-size photographs, namely, “improving access to information on the internet versus artistic expression.” Id. at 819. Apart from the merits of the Kelly holding, that case is factually very different from this one, and Kelly in no way required the District Court to reach the same result here.

In his seminal article, Judge Pierre Leval noted that the analysis under the first statutory fair use factor focuses on whether a use is “of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.” Leval, “Toward a Fair Use Standard,” 103 Harv. L. Rev. 1105, 1110 (1990). In Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 579 (1994) (internal citations omitted) the Supreme Court quoted Judge Leval when stating that “[t]he central purpose of this investigation is to see...whether the new work merely ‘supersede[s] the objects’ of

the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” This Court’s most recent relevant pronouncement stated that “a use is considered transformative only where a defendant changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.” Wall Data Inc. v. Los Angeles County, No. 03-56559, Slip Op. at 5374 (9th Cir. May 17, 2006).

Google’s use of the thumbnail copies is not transformative under this standard. It neither “changes” the underlying work, nor “transforms [it] into a new creation.” Instead, it makes thumbnail copies primarily (indeed, perhaps exclusively) by reproducing reduced-size versions of infringing copies of Plaintiff’s works found on third-party websites. It “uses” these thumbnails only to direct its users to third-party websites where full-scale infringing images are found. It adds no new expression, artistry, meaning or message to the original; its copying is purely mechanical.<sup>16</sup> Nor is the replication from large to small undertaken to comment or criticize Plaintiff’s works. Instead, these thumbnail copies are used

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<sup>16</sup> The fact that the copies are smaller than Plaintiff’s full-size images is not in itself evidence that a new transformative work was created. Instead, this is a functional aspect of Google’s business. Returning multiple search results on a single page increases the chances that the end-user will visit multiple sites, thus maximizing Google’s revenue from its AdSense partners.

by Defendant for its own commercial purposes, as the District Court correctly found. 416 F. Supp. 2d at 846-7. No matter how socially beneficial Google's search engine may be in general, the activity at issue in this case – making unauthorized copies solely to direct users to other unauthorized copies – hardly deserves the label “transformative.”

The Kelly decision does not dictate a finding of “transformativeness” here. In Kelly, the thumbnail versions were copied from authorized copies of the works, which the copyright owner himself had posted online.<sup>17</sup> The defendant's transformative use, according to this Court, was to recast those copies into a search engine to further the legal use of the copyright owner's original works. Kelly, 336 F.3d at 819-21 (stating that Arriba Soft's thumbnails “would guide users to Kelly's web site rather than away from it”). Here, Google copies and reformats into thumbnails almost solely illegal copies of Plaintiff's works from third-party websites. It does nothing to advance any public purpose of furthering legal uses of the original work by directing more traffic to authorized sites.

The District Court overlooked this critical difference between this case and Kelly: here the images which were copied into thumbnails were themselves infringing. Courts have rightfully hesitated to deem uses of unauthorized and/or infringing copies of copyrighted works as fair. See, e.g., Harper & Row, 471 U.S.

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<sup>17</sup> In Kelly there were third party sites involved, but there is no mention in the opinions of any third party infringing websites. 336 F.3d at 815-16.

at 563 (emphasizing the importance of the “propriety of the defendant’s conduct” in regards to the exploitations of an unauthorized manuscript); Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119, 1122 (9th Cir. 1997), cert. denied, 522 U.S. 823 (1997) (finding that the illegitimate reproduction of an unauthorized copy of a work weighed against a defendant under the first factor); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 843 (Fed. Cir. 1992), reh’g denied, 1992 U.S. App. LEXIS 30957 (Fed. Cir. Nov. 17, 1992) (stating that “to invoke the fair use exception, an individual must possess an authorized copy of a literary work.”).

In Kelly, the defendant’s use arguably provided the copyright owner with economic benefit. Here, Google’s use furthers widespread online infringement by directing end-users to infringing copies of Plaintiff’s works. Such a use can hardly be deemed fair, much less transformative. See Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc., 342 F.3d 191, 199 (3d Cir. 2003), cert. denied, 540 U.S. 1178 (2004) (distinguishing a defendant from Arriba Soft because the defendant “indexe[d] and display[ed] unauthorized copies of copyrighted works”). As this Court noted in Wall, “As we balance these [fair use] factors, we bear in mind that fair use is appropriate where a ‘reasonable copyright owner’ would have consented to the use.” No. 03-56559, Slip Op. at 5373 (internal citations omitted). Surely it would be unreasonable to expect the plaintiff to consent to a use of his work which



does nothing but advance infringing uses at the expense of his own licensing market.

The District Court's finding on transformativeness also led it to give insufficient weight to the highly commercial nature of the use, a factor that should weigh heavily against a defendant whose use is not transformative. See Video Pipeline, 342 F.3d at 199 (placing emphasis on the commercial nature of a use where the defendant indexed and displayed infringing copies of works). Google's product may be search, but its business is advertising. Google, 461 F. Supp. 2d at 834. Google's AdSense acts as a commercial advertising broker, matching third-party websites – in this case copyright infringers – with advertisers that have hired Google to place advertisements. Google and the third-party copyright infringers share the ad revenue generated by these match-ups. It is to Google's financial advantage to direct as much traffic as possible to as many websites as possible, including all of the illegal third-party websites containing Plaintiff's works, which compete directly with Plaintiff's legitimate offerings. The District Court's treatment of this behavior as "highly transformative" only serves to encourage, rather than to discourage, infringement on the Internet, particularly to the extent

that Google could minimize the harmful impact of its use of the works of others and discourage infringing behavior.<sup>18</sup>

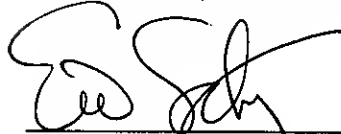
The District Court ultimately concluded that the first fair use factor weighed slightly in favor of Plaintiff, largely because the use was “consumptive” in its impact on the existing market for thumbnail images. This analysis conflates the first factor with the fourth and weakens what should have been a strong finding that Google’s non-transformative use was not fair. Indeed, the outcome on the first factor should have been the same even had there been no existing market for thumbnails. This Court’s warning in *World Wide Church* may have gone unheeded: “the fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified. Thus, notwithstanding the importance of the market factor...it should not overshadow the requirement of justification under the first factor.” 227 F.3d at 1120 (quoting Leval, “Fair Use Standard”).

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<sup>18</sup> As Plaintiff has established, Google regularly restricts access to content through its search engine. Moreover, there are mechanisms in place, such as the DMCA safe-harbors, which allow online service providers to operate cooperatively with copyright owners to help enforce copyright protection on the Internet. There are technological means that Google could employ, in cooperation with copyright owners to cut off access to infringing third party sites. Holding against Google in this case will in no way threaten legitimate business online. Instead, it will encourage a responsible digital marketplace.

Dated: June 6, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'ES', is written over a horizontal line.

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**CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.P.  
32(a)(7)(C) AND CIRCUIT RULE 32-1,  
MADE APPLICABLE TO AMICUS BRIEFS BY F.R.A.P. 29(d).**

U.S. COURT OF APPEALS CASE NO. 06-55406  
Consolidated with Nos. 06-55425 and 06-55405

I certify that:

Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 29(d), the  
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DATED: June 6, 2006

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